

Association of
Title IX Administrators

Civil Rights Investigator Level One: Foundations

Training & Certification Course







Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

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AGENDA

1. Title IX Overview
2. Legal Basis for Title IX Liability
3. Title IX Coordinator Oversight
4. Civil Rights Investigation & Resolution Model: An Overview
5. Notice to the Recipient
6. Beginning the Investigation

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AGENDA

7 Case Study

8 Evidence

9 Pre-Interview Considerations

10 Meeting with the Parties

11 Questioning Skills

12 Trauma-infused Interviewing

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AGENDA

13 Witnesses

14 Helpful Investigation Documents

15 The Investigation Report

16 Role of the Investigator in Appeals

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TITLE IX OVERVIEW

- The Law
- The IX Commandments
- Equality v. Equity

TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."



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THE IX COMMANDMENTS

INVESTIGATION (plus **prompt** & **fair** per VAWA Sec. 304)	**Thorough**	**Reliable**	**Impartial**
PROCESS	**Prompt**	**Effective**	**Equitable**
REMEDIES	Act reasonably to stop discrimination	Act reasonably to prevent recurrence	Act equitably to remedy effects

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EQUALITY
requires a level playing field that doesn't yet exist



JUSTICE
eliminates systemic barriers

The journey starts by asking those affected how they see and are impacted by the conditions, rules, and resources.



EQUITY
acknowledges systemic impediments with targeted fixes



AGENCY
individuals know that access is their right

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Adapted from Pittman, Karen (2018). *Changing the Odds Together.*

LEGAL BASIS FOR TITLE IX LIABILITY

- Significant Cases
- Intersection of Title VII and Title IX
- Titles IX and VII Interrelated Investigations
- Due Process

GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)

- Case involved teacher/student sexual harassment
- U.S. Supreme Court created high standard that students must meet to prevail on a sexual harassment claim against Recipients when an employee/student consensual relationship claim basis
- Court said individuals cannot recover monetary damages against a school **unless** the behavior has been reported to someone with power to alter the situation ("**actual notice**") and **"deliberate indifference"** has been demonstrated by the school

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GEBSER V. LAGO VISTA INDEP. SCHOOL (CONT.)

524 U.S. 274 (1998)

- Three-part standard:
  1. An official of the educational institution must have had "**actual notice**" of harassment;
  2. The official must have authority to "**institute corrective measures**" to resolve the harassment problem; **AND**
  3. The official must have "**failed to adequately respond**" to the harassment and, in failing to respond, must have acted with "**deliberate indifference**."

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DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)

- Prolonged pattern of student/student sexual harassment of a fifth-grade girl by a classmate
- Parents complained to three teachers and principal
- The school took no action until the boy was charged with, and pled guilty to, sexual battery
- Filed Title IX action, alleging that persistent harassment and deliberate indifference resulted in her inability to attend school and participate in activities

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DAVIS V. MONROE COUNTY BD. OF ED. (CONT.)

526 U.S. 629 (1999)

Finding in favor of Davis, the Supreme Court expanded on *Gebser*:

- The institution must have "**actual notice**" of the harassment; and the institution must have responded to the harassment with "**deliberate indifference**."
- Additionally, court held:
  - Harassment must be "**severe, pervasive, and objectively offensive**," and the indifference "**systemic**," to the extent that the victim is deprived of educational opportunities or services.

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DAVIS V. MONROE COUNTY BD. OF ED. (CONT.)

526 U.S. 629 (1999)

- Justice O'Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is "**clearly unreasonable in light of the known circumstances**."

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INTERSECTION OF TITLE VII AND TITLE IX

- Title IX was consciously modeled on Title VI of the Civil Rights Act of 1964 and borrowed heavily from Title VII.
- Courts generally apply standards established under Title VII for guidance in how to establish a Title IX violation.
- Title IX prohibits sex-based discrimination in the full range of activities related to the recruitment, evaluation, classification, payment, assignment, retention, or treatment of employees.
- Individuals can use both statutes to pursue the same violations.
- OCR's 2020 Title IX regulations create extensive due process protections for at-will employees accused of misconduct.

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TITLE IX AND TITLE VII INVESTIGATIONS

- Consider intersections of:
  - Role of institutional equity/AA/EOP officer
  - Human resources/faculty/teachers
  - Coordinator of school/campus conduct
  - Athletics
  - Public safety/SRO/Law enforcement
- Oversight of deputy coordinators/Investigators
- Effect of Title IX regulations' sexual harassment definition
- Coordination of remedies in student/employee and employee/student grievance processes
- What happens when employee is a student or student is an employee?

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"PROCESS A" OR "PROCESS B"?

- Due Process is at the heart of OCR's 2020 Title IX regulations. However, the Regulations effectively create two distinct processes for responding to sex-based discrimination. (see ATIXA's 1P2P model)
  - Limiting jurisdictional language and definitions of Sexual Harassment mean that "Process A" (Compliant with 34 C.F.R. § 106.45) **only** applies when that language and those definitions are met.
  - If **any** of the allegations meet the definitions under 34 C.F.R. § 106.30, then the "Process A" must be followed.

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"PROCESS A" OR "PROCESS B"? (CONT.)

- If **none** of the allegations meet the definitions or jurisdictional limitations under 34 C.F.R. § 106.30, then you would follow "Process B," which meets the requirements of fundamental fairness or due process, but likely does not have some of the more prescriptive requirements of Section 106.45 (e.g., mandatory live hearing, cross-examination requirements, requirement for both parties to sign off on informal resolution)
- VAWA Section 304, state law, and case law in your jurisdiction will largely dictate your "Process B."

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DUE PROCESS: CURRENT ISSUES

Due Process is at the heart of OCR's Title IX regulations.

- Applies to both public and private Recipients
- Standard of Evidence
- Requirements for "Emergency Removal"
- Detailed notice of investigation and allegations (NOIA)
- Investigation report and evidence for review/response
- Live hearing with cross-examination mandatory for Higher Ed; optional for K-12
- Advisor involvement (possibly including attorneys)
- Bias by Coordinators, Investigators, Decision-makers, etc.
- Biased and/or insufficient training; materials transparency

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TITLE IX COORDINATOR OVERSIGHT

- In the Investigation Process:
  - Supervise Investigation Structure
  - Supervise Investigation Process
  - Train Investigators

THE TITLE IX TEAM

- Title IX Coordinator (TIXC)
- Deputy Coordinators
- Investigators
- Decision-maker(s)
  - Policy Violation
  - Appeal
- Informal Resolution Facilitator(s)
- Advisors

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TIXC: SUPERVISOR OF THE INVESTIGATION STRUCTURE

The Title IX Coordinator is responsible for:

- Appointment/engagement of Investigators
- Training Investigators and Decision-makers (policy and appeal)
- Supervision of Investigators and investigations
- Helping Investigators develop investigation strategy
- Coordinating supportive measures
- Timeline compliance
- Communication and coordination of investigation teams
- Providing institutional memory to Investigators
- Retaining records of all activities
- May be an Investigator but may not be a Decision-maker
- May serve as a hearing facilitator if no substantive role

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TIXC: SUPERVISOR OF THE INVESTIGATION PROCESS

Title IX Coordinator or designee is responsible for:

- Documenting complaint
- Initial assessment
- Determining extent/footing/nature of investigation
- Notice of investigation and allegations (NOIA)
- Notice of hearing
- Reviewing/transmitting the Decision-maker's written determination
- Coordinating any duty to warn
- Assurance of supportive measures/remedies
- Recordkeeping of all activities

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TRAINING FOR INVESTIGATORS – REGULATIONS

- Definition of sexual harassment
- Scope of the Recipient's education program or activity
- How to conduct an investigation and grievance process, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Understanding "relevant evidence" in order to create an investigation report that fairly summarizes all relevant evidence

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BIAS – REGULATIONS

- The Title IX Coordinator, Investigator, Decision-maker, or any person designated by a Recipient to facilitate an informal resolution process must not:
  - Have a conflict of interest or bias for or against Complainants or Respondents generally, or
  - For or against an individual Complainant or Respondent
  - Bias and conflict of interest by Investigators that impact the outcome are grounds for appeal

Let's explore both bias and conflict of interest. What do these mean?

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Remember: As an Investigator, you have no “side” other than the integrity of the process!

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CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW

- The Process & Ten Steps
- Who Should Investigate?

THE PROCESS



- Complaint or Notice to TIXC

Following a formal complaint

- Jurisdiction
- Dismissal?
- Policy violation implicated?
- Reinstatement to another process?
- Informal or formal resolution?

- Notice to Parties
- Identification of witnesses
- Interview scheduling
- Evidence collection
- Report drafted
- Evidence & report shared
- Investigation report finalized

- Determination
- Cross-examination
- Sanction?
- Remedies

- Standing?
- Vacate?
- Remand?
- Substitute?

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10 STEPS OF AN INVESTIGATION

1. Receive Notice/Complaint
2. Initial Assessment and Jurisdiction Determination
3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation and Allegations (NOIA)
5. Establish investigation strategy
6. Formal comprehensive investigation
   - Witness interviews
   - Evidence gathering

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10 STEPS OF AN INVESTIGATION

7. Draft report
8. Meet with Title IX Coordinator (or legal counsel) to review draft report and evidence
9. Provide report and all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
10. Complete final report
    - Synthesize and analyze relevant evidence*
    - Send final report to parties for review and written response at least 10 days prior to hearing

*The 2020 Regulations permit, but ATIXA does **not** recommend, that Investigators make recommended findings or conclusions

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REQUIRED DEFINITIONS – REGULATIONS

Sexual Harassment is conduct on the basis of sex meeting one of the following conditions:

- An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the Recipient's education program or activity; or
- "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v)
  "Dating violence" as defined in 34 U.S.C. 12291(a)(10)
  "Domestic violence" as defined in 34 U.S.C. 12291(a)(8)
  "Stalking" as defined in 34 U.S.C. 12291(a)(30)

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THE CONSENT CONSTRUCT

- Was force used by the Respondent to obtain sexual or intimate access?
  - Physical violence
  - Threats
  - Intimidation
  - Coercion
- Was the Complainant incapacitated?
  - Did the Respondent know the Complainant was incapacitated, or
  - Should the Respondent have known that the Complainant was incapacitated (e.g., by alcohol, other drugs, sleep)?

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THE CONSENT CONSTRUCT

- What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

THIS IS COVERED IN MORE DETAIL IN INVESTIGATOR TWO

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WHO SHOULD INVESTIGATE?

Investigations of sexual harassment must be impartial, thorough, and reliable. Investigators must be well-trained.

- Title IX Coordinator?
- Standing panel of Investigators?
- Human resources?
- Student services?
- Administrators/staff?
- Teachers/faculty?
- Coaches?
- Outside/external Investigator?
- NOT Legal Counsel

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ROLE OF LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS

- Legal standards for criminal investigations are different
- Police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively
- Conflict of interest for sworn officers
- Add value by supporting Recipient's investigation efforts
- Establish MOUs with Recipient police and other local enforcement and update annually
  - The power of the tabletop exercise

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SHOULD THERE BE MORE THAN ONE INVESTIGATOR?

No specific requirement, but:

- Investigation must be prompt, thorough, and impartial
  - A pool of Investigators may help to ensure that your investigation meets these requirements
  - Always have alternates available in case of recusal, illness, etc.
- Investigator must collect the maximum amount of relevant information available to help Decision-maker make a determination
- ATIXA prefers a team approach when possible

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TEAM INVESTIGATIONS

Other benefits:

- Allows for strategic selection of Investigators based on case elements and parties
- Ability to brainstorm investigation steps and lines of questioning
- Co-facilitate interviews
- Flexibility if there is any conflict with Investigators and parties
- Share the heavy lift of required documentation and recordkeeping

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INVESTIGATION TEAM PROCESS OVERVIEW

- The investigation team, in consultation with the Title IX Coordinator, strategizes the entire investigation, including methodology, order, timeline, goals, obstacles, etc.
- Interview all witnesses
- Gather and assesses all available evidence
- Write a report
- Provide report to the parties for review, then edit as needed and provide final report and investigation file to:
  - Coordinator, who then shares with the Decision-maker(s)
  - Parties and Advisors

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NOTICE TO THE RECIPIENT

- Actual Knowledge/Notice
- Formal Complaint
- When do you investigate?
- Jurisdiction

NOTICE/ACTUAL KNOWLEDGE – REGULATIONS

Actual knowledge:

- Notice of sexual harassment or allegations
- In an education program or activity
- Against a person in the United States
- To a TIX Coordinator, or
  - Any official with authority to institute corrective measures on behalf of college or university
  - Any employee of an elementary or secondary school

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ACTUAL KNOWLEDGE

- Individual notifies the Title IX Coordinator or “official with authority to institute corrective measures” (OWA)
  - Deans?
  - Conduct staff?
  - Recipient police or campus safety?
- What about K-12?
  - All employees
- What about Responsible Employees?
  - ATIXA recommends Recipients require all employees to report, unless confidential. Preferred term is Mandated Reporter.

Recipients must ensure that employees are trained regarding their obligation to report harassment to appropriate administrators.

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NOTICE/ACTUAL KNOWLEDGE – REGULATIONS (CONT.)

What is required after **Actual Knowledge**?

- A prompt response that is not deliberatively indifferent
  - Outreach to Complainant
  - Optional supportive measures
  - Take wishes of Complainant into account
  - Information about how to file a “formal complaint”

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FORMAL COMPLAINT – REGULATIONS

Formal Complaint:

- Document or electronic submission requesting an investigation
- Filed by Complainant or signed by TIX Coordinator
- Alleging Sexual Harassment
- Complainant must be participating or attempting to participate in the Recipient's education program or activity
- Initiates mandatory grievance process (investigation and hearing)

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VAWA SECTION 304
INFORMATION FOR COMPLAINANT

- Complainants should receive written information regarding:
  - "Procedures victims of IPV, Sexual Assault, and Stalking should follow."
  - Interim measures (e.g., academic, living, transportation, work)
  - Services available on and off-site (e.g., counseling, advocacy, health)
  - Reporting options (e.g., institutional police, local police, student conduct, human resources)
  - Protection options (e.g., order of protection, no-contact orders)

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WHEN DO YOU INVESTIGATE?

- Upon receipt of a formal complaint, investigation is required
- What about misconduct that is open and obvious to OWAs?
- What about rumors, gossip, social media, etc.?
  - Discretionary, but often recommended
  - OCR may not think these create an obligation for formal action, but will courts agree?
- Anonymous reports

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WHEN DOES TITLE IX APPLY?

- Title IX complaint **must** be dismissed if did not occur against a person in the U.S., but…
  - Contrary to case law
  - May take action under your code of conduct or other policies
- ***Davis* standard** – Title IX applies, and jurisdiction is required, when the Recipient has:
  - Control over the Respondent AND control over context of the harassment
    - Includes any building owned or controlled by an officially recognized student organization
    - At the time of filing a complaint, Complainant must be participating in or attempting to participate in the Recipient's education program or activity

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WHEN DOES TITLE IX APPLY?

Jurisdiction

- Covered Programs (all programs)
- Jurisdictional Limitations
  - Geographic
  - Temporal
- When is a student a “student”?
  - Application-Admission-Registration-Attendance-Breaks
- When is a Complainant “participating in or attempting to participate in the Recipient’s education program or activity”?
- When is an employee an employee?

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WHEN DOES TITLE IX APPLY?

Jurisdiction for Off-Campus Incidents:

- When sufficient Recipient control is established
- Or when the off-campus conduct has an in-program effect that meets the definition of 34 C.F.R. § 106.30
- If Title IX jurisdiction is not present, the behavior could still violate:
  - Institutional harassment/discrimination policies
  - Student Handbook/Conduct policies
  - Technology/Acceptable Use policies
  - Employee Handbook/policies
  - Professionalism standards

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JURISDICTION FOR OFF-CAMPUS INCIDENTS

- Mandatory jurisdiction means Title IX applies
  - Requires application of regulations
  - Other policies may also apply
  - Collateral misconduct
- Discretionary jurisdiction means the Recipient may address incidents occurring off-campus or on non-school owned/controlled property
  - Under other policies or codes of conduct
  - Outside of the Title IX process

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MANDATORY DISMISSAL – FOUR GROUNDS

The Title IX Coordinator MUST dismiss a complaint at any time during the investigation or hearing:

1) If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Title IX regulations even if proved, and/or
2) If the conduct did not occur in the Recipient's education program or activity,* or
3) If the conduct did not occur against a person in the United States, or
4) If at the time of filing a formal complaint, a Complainant is not participating in or attempting to participate in the education program or activity of the Recipient.

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DISCRETIONARY OR PERMISSIVE DISMISSAL

The Title IX Coordinator MAY dismiss a complaint if at any time during the investigation or hearing:

1) If a Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations; and/or
2) If the Respondent is no longer enrolled or employed by the Recipient; and/or
3) If specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination regarding the formal complaint or any allegations.

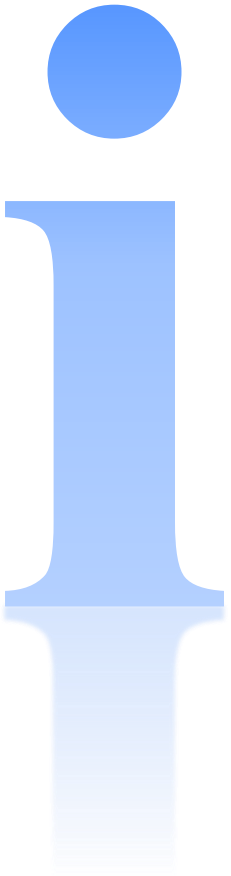
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NOTICE OF DISMISSAL

- Upon a mandatory or permissive dismissal, the Title IX Coordinator should promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties
  - Dismissal is appealable
  - May reinstate the complaint under another provision of the Recipient's code of conduct or other applicable resolution procedures

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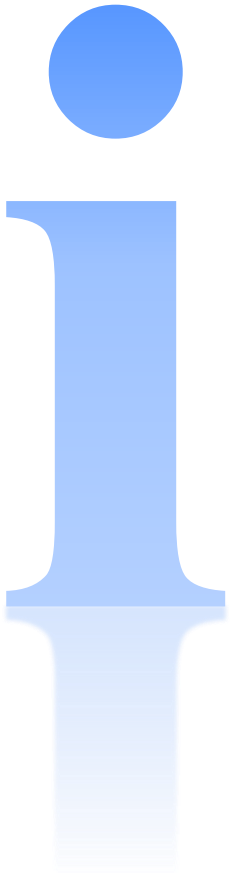
INITIAL ASSESSMENT IN SUMMARY



- Has there been a formal complaint?
- Does the TIXC need to sign/initiate a formal complaint?
- Does the alleged conduct meet the required definitions?
- Does jurisdiction exist?
- Can/should Recipient remedy informally or without discipline?
- Mandatory/Discretionary dismissal considerations
- If dismissed, should an alternate process begin?

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INITIAL ASSESSMENT IN SUMMARY



If proceeding under Title IX:

- Establish basis of investigation
  - Incident or pattern, and/or climate/culture
- Establish a preliminary timeline for the investigation
- If no formal action, document all actions taken
- Responding to anonymous reports:
  - Determine if a trend or pattern may be apparent
  - Can you identify parties?
  - Duty to attempt some form of remedial response, even to an anonymous report

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SUPPORTIVE MEASURES

- Provided to all parties throughout the process:
  - Non-disciplinary, non-punitive
  - Individualized
  - Restore or preserve equal access
  - Without unreasonably burdening other party
  - Protect safety of parties or environment, or deter sexual harassment
- Remedy on behalf of community, not just parties
- If supportive measures not provided, document why not

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SUPPORTIVE MEASURE EXAMPLES

- Counseling and/or health service referral
- Employee Assistance Program referral
- Visa and immigration assistance
- Student financial aid counseling
- Community or community subgroup education
- Altering housing assignment
- Safety planning
- Transportation assistance
- Timely warnings
- Altering work arrangements for employees or student-employees
- Providing campus safety escorts
- Contact limitations (no contact orders)
- Academic support, extensions of deadlines, or other course-related adjustments
- Increased security and monitoring of certain areas
- Trespass, Persona Non Grata, or Be on the Lookout (BOLO) orders

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EMERGENCY REMOVAL

- Individualized risk and safety analysis
- Immediate threat to health or safety
- Due Process requires opportunity to challenge removal, usually after it is implemented
  - May allow equitable participation of Complainant, unless the decision does not directly relate to Complainant
- Does not apply to non-student employee administrative leave
- Emergency Removal decisions may be made at any point and include decisions to remove from any educational program or activity

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BEGINNING THE INVESTIGATION

- Investigation Philosophy
- Timeframes for Resolution
- Informal or Formal Resolution Process?
- Formal Comprehensive Investigation
- Notice to the Parties
- Strategize the Investigation

INVESTIGATION PHILOSOPHY

- The burden of proof and the burden of gathering evidence rest on the Recipient, not the parties
  - This is likely not a change from current investigation requirements
  - Affirmative consent standards do not shift this burden, but that is a common misunderstanding of how affirmative consent standards work.
- Title IX regulations require a stated presumption of the Respondent being “not responsible”

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"REASONABLY PROMPT" TIMEFRAMES FOR GRIEVANCE PROCESS

60-90 days to resolution is a good guide for more complex cases in higher education

- Timeline starts from notice, not from the incident itself
- No set requirement other than to have prompt, designated timeframes in your procedures
- Goal is to avoid undue delay
- **For K-12, the timeframe will be much shorter.**
- What about injunctions?
- What about Summer break? Sabbatical? FMLA? Winter break? Studying abroad?

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TIMELINES

- Ensure that all steps in the investigation are conducted according to the timelines in the Recipient's procedures.
  - Procedures should provide some flexibility at the discretion of the TIXC.
- Parties and witnesses should be interviewed as soon as possible:
  - Ensures that recollections are as fresh and accurate as possible
  - Not before Notice of Investigation and Allegations (NOIA)

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TEMPORARY DELAYS/EXTENSIONS

- Examples of good cause
  - Absence of a party
  - Absence of a party's Advisor
  - Concurrent law enforcement activity
  - Language assistance
  - Accommodation of disabilities
- If an extension is granted, all parties must be notified in writing as to the extension and rationale

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INFORMAL RESOLUTION PROCESS

The OCR endorses and encourages informal resolution, and it is an effective practice, when voluntary.

- Following formal complaint
- Allowed at any time prior to a final determination at discretion of TIXC
- Voluntary written consent of the parties
- Title IX regulations preclude informal resolution of allegations that an employee harassed a student

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FORMAL COMPREHENSIVE INVESTIGATION

- Commence a thorough, reliable, impartial, prompt, and fair investigation
  - Determine the strategy for the investigation
  - Witness interviews
  - Evidence gathering
  - Intended timeframe to complete the investigation
  - Evidence review
  - Report writing and review
- Complete the investigation without unreasonable deviation from the timeline

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STRATEGIZE THE INVESTIGATION

Common questions to consider:

- Whom to interview?
- When/in what order?
- What information/evidence can be obtained?
- How do we maximize the quantity/quality of evidence?
- How and when do we notify witnesses?
- Who needs to be aware of the investigation?
- When and how do we share evidence/information with the parties?

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CASE STUDY: GWEN AND MARK

GWEN'S STATEMENT

- Gwen is a first-year student who lives in Cedar Hall with her roommate, Holly. She has been having some strange things happen. She told Campus Public Safety about it, but they said they couldn't really do anything. She told her RA Michelle what's been going on, and Michelle referred Gwen to you. Gwen has made a formal complaint.
- About a month ago, Gwen was studying in Fleming Library on campus. She went to check out a reading that was on reserve at the front desk for her Intro. to Economics class. The male at the front desk was kind of chatty and they made small talk. The next day, she got an email sent to her campus email address that said: "Hey Gwen, it's Mark. Cool talking to you. I took Econ when I was a freshman, so if you need any help just let me know."

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GWEN'S STATEMENT

- Gwen was surprised to get this email, but she didn't want to be rude, so she wrote back, "Thanks, but I think I got it so far lol!" She didn't recognize the name on the school email account, Mark Noy, but she assumed that it was the guy who worked at the library.
- The person wrote back, "Cool. Hey one of my buddies is having a party after the game Sat., you should come. It'll be a blast." They emailed back and forth a few times. He sent her some pictures of himself, and it was the guy from the library. Gwen stopped responding because she started to get a little creeped out. He asked for her Snapchat but she didn't give it to him.

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GWEN'S STATEMENT

- About two weeks ago, Gwen was at a party with Holly and a friend named Carter. Gwen noticed that Mark was at the party too. Doing her best to avoid Mark, Gwen circled the party catching up with friends she had not seen in a while. As the evening progressed, a few people expressed concern about Mark. Friends told Gwen that Mark was asking questions about Gwen and staring at her. When Gwen went to the restroom, Mark was there when she exited. She tried to quickly scoot by him. Carter noticed Mark staring at them.
- The following day, Gwen got a text from Mark asking what she was doing, but she didn't respond. She thinks someone at the party must have given him her number. She doesn't want to be friends, but she doesn't want to seem like a jerk.

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GWEN'S STATEMENT

- Last week, Gwen was leaving math class with her roommate Holly and saw Mark standing outside the math building by himself, staring at her. She sort of waved but kept walking.
- A few days ago, Gwen found a note on her car which she parks on campus; it had a hearts and arrows on it. That night someone wrote, "Gwen u r so hot" on the whiteboard outside her room and drew the same hearts and arrows.
- Last night, she got a text middle of the night from a blocked number that said, "Gwen I luv you." She freaked out and wrote back "Who is this?? Leave me the fuck alone." The person texted back, "Fuck you, bitch."

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GWEN'S STATEMENT

- Although she can't prove it, she feels like all of these things must be Mark.
- She has been avoiding Fleming Library and has been having friends walk her to and from her car at night.

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CASE STUDY

- How will you proceed with an investigation?
  - Who do you want to talk to?
  - Order of interviews?
  - What information do you need to gather?
  - When will you meet with Mark?
  - When does Mark receive an NOIA?

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NOTICE TO THE PARTIES - REGULATIONS

Upon receipt of a formal complaint, a Recipient must provide written notice to the parties who are known:

- Notice of the grievance process, including any informal resolution process
- Notice of the allegations with sufficient time to prepare a response before any initial interview and sufficient details known at the time, including:
  - Identities of the parties involved in the incident, if known
  - Description of conduct
  - Date and location, if known

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NOTICE TO THE PARTIES - REGULATIONS (CONT.)

- Respondent is presumed not responsible and a determination regarding responsibility is made at the conclusion of the grievance process
- Parties may have an Advisor of their choice, who may be an attorney
- Parties may inspect and review evidence prior to the completion of the investigation report
- Any provision from code of conduct that prohibits knowingly making false statements or knowingly submitting false information (if any)
- Update notice if additional allegations will be added/investigated

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RIGHTS OF THE PARTIES DURING THE INVESTIGATION - REGULATIONS

Right to:

- present witnesses, including fact and expert witnesses
- present inculpatory and exculpatory evidence
- discuss the allegations under investigation without restriction
- gather and present relevant evidence without restriction
- be accompanied to any related meeting or proceeding by Advisor of their choice, who may be, but is not required to be, an attorney
- written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- inspect and review evidence and draft investigation report before finalized

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WITNESS INTERVIEWS - STRATEGIES

- Strategize contacting witnesses, ordering witness interviews, and preventing contact between witnesses, where necessary
  - Is there any allowance for interviewing witnesses and accumulating evidence prior to sending the NOIA?
- Solicit witness lists from the Complainant and Respondent
- Determine when you are going to question Respondent
- **Example order***:
  Complainant → Respondent → Witnesses Identified by the Parties → Neutral witnesses → Any additional witnesses → Round 2 → Round 3.

  *Every case is different

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PRIVACY – REGULATIONS

Additional permissions from the parties required for:

- Records made or maintained by a:
  - Physician
  - Psychiatrist
  - Psychologist
- Questions or evidence that seek disclosure of information protected under a legally recognized privilege

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EVIDENCE

RELEVANCE

- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue
- Evidence of the Complainant's **sexual predisposition** is explicitly and categorically not relevant.
- Evidence of the Complainant's **prior sexual behavior** is not relevant except for two limited exceptions:
  - Offered to prove that someone other than the Respondent committed the conduct alleged, or
  - Concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is offered to prove consent
- While the regulations do not require the same analysis applied to the Respondent, Recipients should consider applying this analysis equitably except for pattern investigations

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EVIDENCE GATHERING

- Engage in the active accumulation of evidence
- Timeliness
- Document receipt of information and other materials as they are obtained during the investigation
- Verify/authenticate evidence
- Be thorough in your examination of factual, circumstantial, and hearsay evidence, and ensure that all evidence has been examined, and all leads exhausted

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EVIDENCE GUIDELINES

- **All** relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory
- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
  - Present witnesses
  - Present evidence
  - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence which may be offered

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EVIDENCE COLLECTION AND ISSUES OF CONCURRENT CRIMINAL ACTION

- What if law enforcement is the sole source of evidence collection?
  - And they won't release the evidence to you?
  - Does it matter if they are local or the SRO/campus law enforcement/public safety?
- What if there is a pending criminal or civil case?
- What if a party or parent/guardian threatens to call a lawyer or file a lawsuit?
- What if a party files a lawsuit or complaint with the OCR?

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PRE-INTERVIEW CONSIDERATIONS

INTERVIEW SCHEDULING

- Try to anticipate how long each interview will take (e.g., How many times will you interview the witness? How much time can the witness give you?). Schedule your interview slots accordingly.
- Back-to-back interviews should be avoided, if possible. Interviews often take longer than expected and may require you to reschedule interviews.
- Leave some time after each interview for post-interview review

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PREPARE FOR EACH INTERVIEW

- Outline your interview questions in advance but be flexible. If you need to deviate from your script and insert a logical follow-up question, be prepared to do so.
- Plan the order of interviews
- Most beneficial to conduct interviews in person, if conditions permit
- Interviews should be conducted in a neutral, quiet, and private setting with no or minimal likelihood of interruptions

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ESTABLISH PRE-INTERVIEW GROUND RULES

- Who will attend?
- How will records be kept? Recording? Access?
- Role of Advisors
- Difference between Advisor/attorney role in interviews vs. in a hearing
- Involvement of parents/guardians, union reps, support persons, etc.
- FERPA (students)/Employment records/confidentiality

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SHARING INFORMATION WITH PARTIES AND WITNESSES DURING INVESTIGATION

- Decide how much information you will share in advance of each interview and have a rationale for what information will be shared and what will not be shared
  - Remember that prior to a decision, the parties must have an opportunity to review all "directly related" evidence
  - You may be challenged on a decision not to share, so have a rationale
- Explore only those facts that are relevant to the issue at hand or that seem likely to lead to relevant evidence
- Start with broad questions, then move to narrow, more pin-pointed questions

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MEETING WITH THE PARTIES

ADVISOR OF CHOICE

An "Advisor of choice" may be anyone, including:



- You may establish ground rules for the participation of Advisors in all meetings
- If a party does not have an Advisor, the Investigator should inquire as to whether they would like one provided by the institution at no cost (higher ed. only)
  - Under the regulations, this will have to be done at the hearing, but it is recommended to appoint one at the outset of the process

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PROVIDING POLICY AND PROCEDURE COPIES

- Each party should receive a copy of:
  - The specific policies alleged to have been violated (not a link), including any sub-parts or sections
  - The procedures that will be used to resolve the complaint, including the rights that extend to the parties (not a link)
- Consider providing parties with your non-retaliation provision/policy
- Keep copies of the applicable policies and procedures in the investigation file
- Provide ample opportunity for the Complainant and the Respondent to ask questions

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BEGINNING THE INTERVIEW

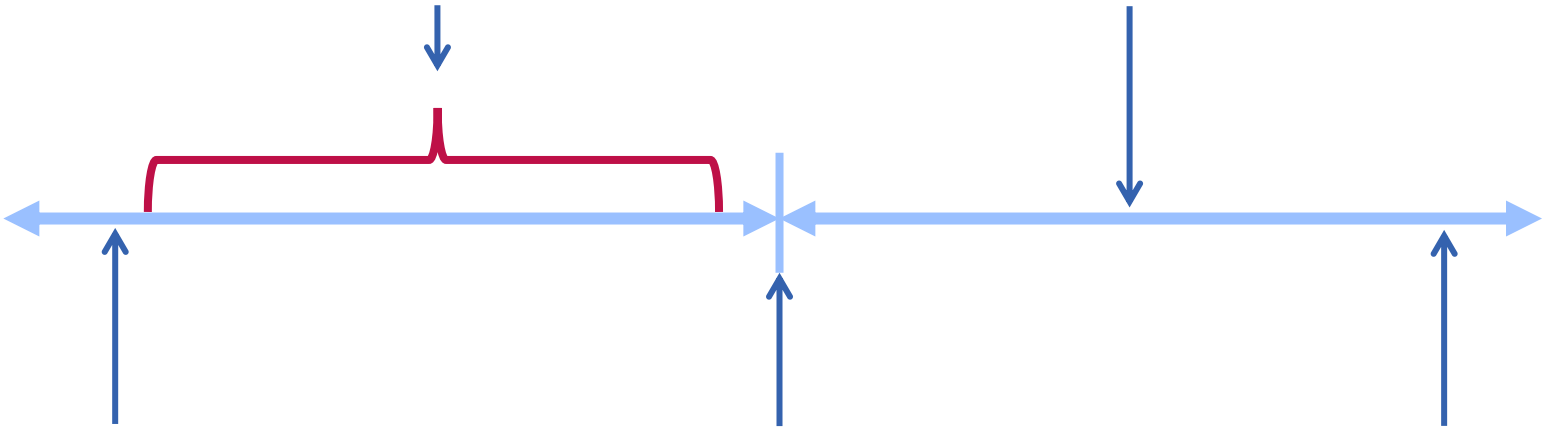
- Be sure the Complainant and Respondent understand the parameters of the policy, what it does and does not cover, how the process works, and what the process can and cannot accomplish.
- Discuss thoroughness and the need for completeness; make sure they don't leave facts out (i.e., alcohol/drug use). Explain your amnesty policy, if applicable.
- Create comfort with language and sensitive subjects.
- Establish rapport before questioning.
- Document whether individual is cooperative or resistant.
- Be professional: gather the facts, make no judgments, and make no unnecessary statements about the parties.

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EXPLAINING EVIDENTIARY STANDARDS

Insufficient Information
- Less than this and the case does not proceed
- "No reasonable person could make a finding of responsible"

Clear and Convincing
- Very sufficient evidence



No Evidence
- Non-case
- False Claim

Preponderance of the Evidence
- More likely than not
- 50% plus a feather

Beyond a Reasonable Doubt
- Overwhelming Evidence

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DEMEANOR OF INVESTIGATOR(S)

- Work to establish a baseline of relaxed conversation
- Maintain good eye contact
- Listen carefully to the answers to your questions
  - Avoid writing while party/witness is talking, if possible
  - Do not be thinking about your next question while party/witness is talking
- Ask questions in a straightforward, non-accusatory manner
- Nod affirmatively and use active listening skills to prompt or keep party/witness talking

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INTERVIEWING SKILLS

- Take their statement from start to finish through a process of broad to narrow questions and issues that need to be addressed.
- Ask questions about the allegations, the evidence, and the policy elements.
- Focus on areas of conflicting evidence or gaps of information.
- Drill down on timelines and details.
- Don’t leave a question or gap unanswered.
- Pay attention to alcohol/drug consumption and timing of consumption, if relevant.

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INTERVIEWING THE COMPLAINANT

- Acknowledge difficulty of reporting and thank them
- Acknowledge that they may have told this story multiple times already
- Explain why you are taking notes and/or ask for permission to record, if applicable
- Provide a copy of your policies and procedures
- Ask them to share a complete account of what occurred
  - Have them give full narrative without asking questions, then drill down on details
- Ask about outcry witnesses and possible documentation such as blogs or journals
  - What will witnesses likely say/know?

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INTERVIEWING THE COMPLAINANT

- Ask about those they spoke to about the incident
- Ask what the Complainant's motivation is for reporting and what they hope to see as a result
- Find out if their academics and/or work have been affected
- Ask how the incident(s) affected them emotionally and/or physically
- Advise that the allegations will be discussed with the Respondent and witnesses
- Let the Complainant know next steps and when you will be in contact
- Suggest that the Complainant consult their Advisor before discussing the investigation with others, without placing restrictions on doing so.

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RELUCTANT COMPLAINANTS

When a Complainant is reluctant to a make or continue with a formal complaint, or withdraws after filing one, the TIXC will determine next steps

- A risk or threat assessment of some kind, as well as consideration of the Complainant's reasons may affect whether the TIXC decides to proceed and file a formal complaint themselves
- Although an investigation could proceed without the Complainant, it may prove difficult or impossible for the Investigator to gather sufficient evidence
- Effect of not submitting to cross-exam at hearing
- Possibility of informal resolution

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REQUESTS FOR CONFIDENTIALITY

The TIXC should explain to the Complainant that:

- Support and resolution may be limited based on the level of confidentiality or privacy requested by Complainant
- Privacy cannot be guaranteed if doing so would jeopardize the safety of the Complainant or others in cases involving pattern, predation, violence, threat, weapons, minors, or other compelling safety risks.
- If the Complainant chooses to proceed, only those with a need to know will be informed.
  - Train those who will be informed about "confidentiality" (really privacy)
  - Privacy vs. Confidentiality vs. Privilege

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REQUESTS FOR CONFIDENTIALITY (CONT.)

- Title VII implications for employee Respondents
- Implications for minor Complainants

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RELUCTANT COMPLAINANTS

- The Complainant should be notified of their options:
  - The process will still be available to them, regardless of how long they wait, as long as control over Respondent remains
  - The Recipient will support them in all reasonable ways (e.g., housing, classes, no contact orders)
  - Informal resolution could be an option, if offered
  - If information is brought to attention of the Recipient that may involve a threat to community, the Recipient may be forced to proceed with an investigation, but the Complainant will be notified of the process and treated as if they are fully participating, if they wish

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INTERVIEWING THE RESPONDENT

- Acknowledge difficulty of the situation and thank the Respondent for meeting with you
- Provide a copy of your policies and procedures
- Ask them to share a complete account of what occurred
- Question the Respondent regarding the allegations – ask a combination of open-ended and closed-ended questions
- Get detailed – do not leave a question unanswered
- Ask about witnesses and any other relevant information
  - What will witnesses likely say/know?
- Ask about possible motivation for allegation(s)

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INTERVIEWING THE RESPONDENT

- Provide support and resources throughout the process as needed
- Let the Respondent know next steps and when you will be in touch
- Discuss counseling options and other supportive measures if they are not already connected
- Discuss non-retaliation and any steps such as no-contact orders, housing moves, and emergency removals
- If Emergency Removal is employed, review the terms and provide a timeframe
- Suggest that the Respondent consult their Advisor before discussing the investigation with others, without placing restrictions on doing so

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FINAL QUESTIONS FOR ALL INTERVIEWS

- Is there anyone else that you think we should talk to?
- Are there any questions that we didn't ask that you thought we should have or were going to?
- Is there anything else you think we need to know?
- FOR THE PARTIES
  - Are there any questions that you would like us to ask any other witness or the other party(ies)?
  - DOCUMENT THIS – See the next slide…

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"APPENDIX C"

Questions suggested or requested to be asked by the parties should be documented and included as an appendix in these sections:

- **Section 1**: Questions the party wanted asked specifically but were not because the answers were gained in a narrative or otherwise volunteered. The question posed and the answer should be noted here.
- **Section 2**: Questions the party wanted asked specifically that were asked and in the manner the party wanted.
  - Document: The question they wanted, how it was asked and the answer

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"APPENDIX C" (CONT.)

- **Section 3**: Questions the party wanted asked specifically that were asked but not in the manner the party wanted
  - Document: The question they wanted, the one that was asked, the answer and the rationale for changing the form of the question (e.g., argumentative, blaming, improper form)
- **Section 4**: Questions the party wanted asked specifically that were not asked
  - Document: The rationale for not asking the question (e.g., irrelevant, already asked and answered)

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QUESTIONING SKILLS

QUESTIONING CONSIDERATIONS

- Understand an “interview” versus an “interrogation”
  - An interview is a conversation designed to elicit information in a non-accusatory manner
  - Shifting to an interrogation approach should not be done lightly; you cannot go back – not recommended
- What are the goals of questioning?
  - Learn the facts
  - Establish a timeline
  - Understand each party’s perception of what happened
- NOT the goals of questioning:
  - Curiosity
  - Chasing the rabbit into Wonderland

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QUESTIONING CONSIDERATIONS (CONT.)

Consider before asking questions:

- What are the relevant issues?
- What do I need to know?
- Why do I need to know it?
- What is the best way to ask the question?
- Am I minimizing the re-traumatization potential for all parties?
- Am I avoiding blaming or biased questions?
- Am I the right person to ask this?

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QUESTIONING CONSIDERATIONS (CONT.)

- Have a purpose for asking every question.
- Be sure to ask a question, not make a speech.
- Don’t be accusatory or argumentative. You don’t decide the allegations and should have no real stake in their outcome.
- Don’t make questions too long or confusing.
- If you ask a bad or blaming question, take it back.
- If you say something inappropriate, apologize.

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TYPES OF QUESTIONS

Use

- Open-ended Questions
  - Tell us…who, what, how?
- Closed-ended Questions
  - Did you, were you?
  - Use infrequently, but when needed to drill down on a specific issue.

Avoid

- Compound Questions
  - I have two questions. First…, Second…
- Multiple Choice Questions
  - Were you a), b), c)…?
- Leading Questions
  - Isn't it the case that…?

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QUESTIONING

- Listen carefully and adapt follow-up questions
- Avoid evaluative responses to a person's answers
  - E.g., "That's too bad;" "I'm glad you said that"
  - Empathy vs. sympathy
- Do not moralize or sanitize
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as "hooked up," "drunk," "sex," "fooled around," "had a few drinks," "was acting weird"
- Be cautious with questions that invite parties to second-guess their actions, as this may be perceived as blaming. The questions may be fair game, but it's all in how you ask them.

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QUESTIONING EXERCISE

Please critique the following questions:

1) When you did (X), what effect do you think that had on the other party?
2) What was your goal when you offered to take them home?
3) What were you thinking when you went into their room?
4) Do you feel like you had too much to drink?
5) Do you remember the training session we did on Title IX and consent and harassment?
6) I have a couple of questions: First, could you tell they were incapacitated?; and second, why did you give them another drink when they already appeared to be really drunk?

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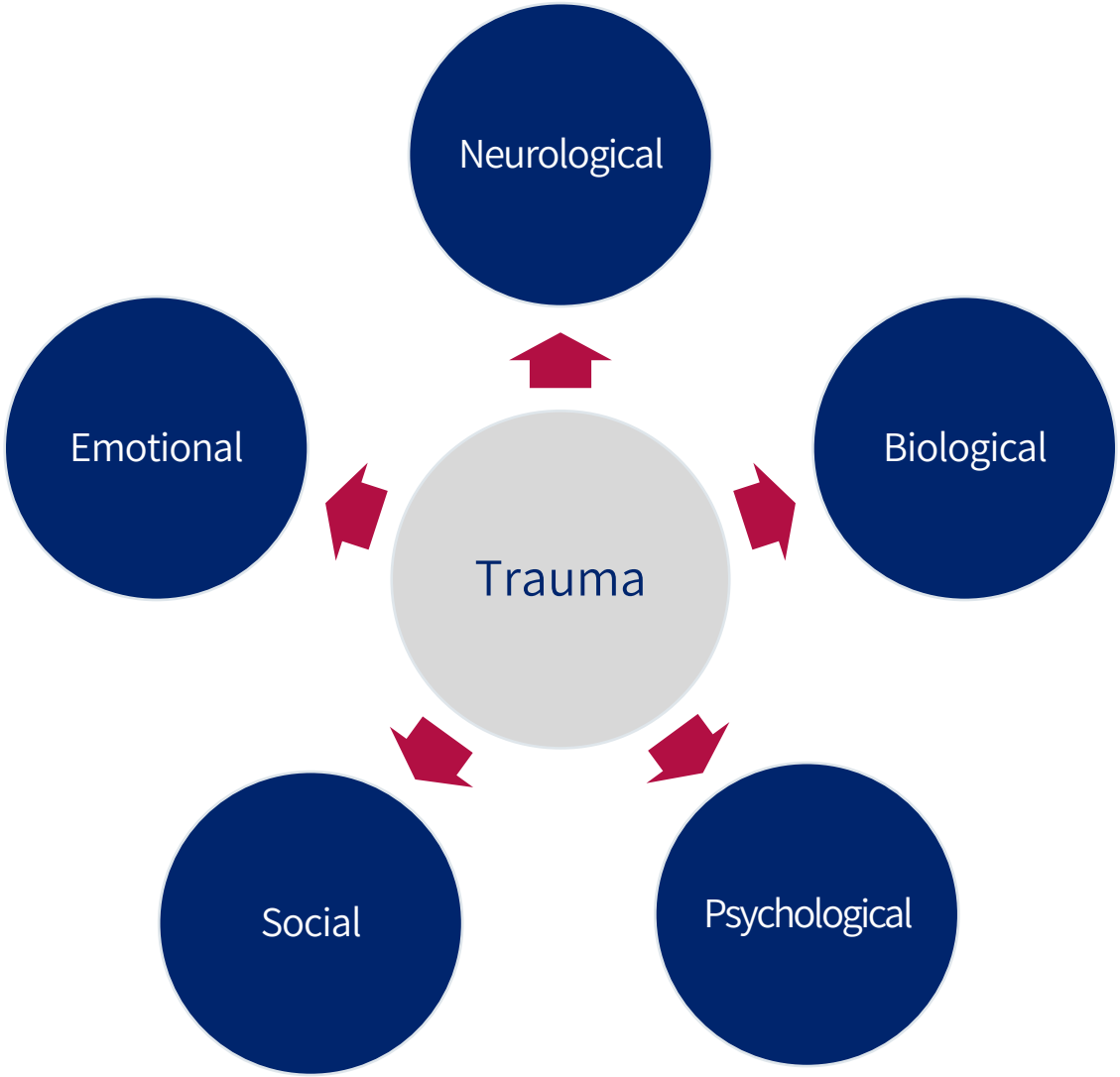
QUESTIONING EXERCISE

7) If you were in this situation again, what would you do differently?
8) Did you have any expectations when you got back to the apartment?
9) How would you feel if you were the other party?
10) How would you like if someone did this to you?
11) Do you think you have any responsibility for what happened?
12) What clear words or actions gave you consent?

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TRAUMA-INFUSED INTERVIEWING

IMPACT OF TRAUMA ON FUNCTIONING



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THE BRAIN'S RESPONSE TO TRAUMA

In response to the anticipated trauma of sexual assault or other violence, hormones can be released into body which impact:

- Ability to react physically
- Ability to think rationally
- Ability to consolidate or group memories

This is a neurobiological response, not a choice.

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TRAUMA-INFUSED RESPONSE

- Promotes safety
- Recognizes the impact of trauma on a cognitive, physical, psychological, emotional, and neurobiological level.
- Understands how trauma can impact someone's academics/work/social life
- Recognizes the need for support/positive relationships
- Honors choice with the goal of empowerment
- Is respectful and considers boundaries and privacy
- It does NOT mean that you cannot or do not probe the credibility of the interviewee

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TRAUMA AND INTERVIEWING

- Prioritize developing rapport and building trust
- Emphasize transparency and predictability
- Physical aspects of interview (light, access, comfort, etc.)
- Be cognizant of why someone may have responded in a "counterintuitive" manner
- Be mindful that recall is often difficult and slow following trauma
- Use non-judgmental/non-blaming language
- Avoid re-traumatization (but must still ask necessary questions)
- Use Cognitive Interviewing to aid recall (learn more about this in Investigator Level Four Certification)

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TRAUMA AND INTERVIEWING (CONT.)

Avoid:

- Unsupportive responses
- Taking control any more than is necessary
- Escalating the situation
- Defining or labeling a party's experience.
- Asking why questions (i.e., "Why did you . . . ?")
- Verbalizing judgment in the moment
- Using trauma as a substitute for evidence or basis to assess credibility
  - Trauma doesn't prove anything in terms of a policy violation

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WITNESSES

STARTING THE WITNESS INTERVIEW

Set the tone:

- Thank them for meeting with you
- Review your role as a neutral fact-finder
- Put them at ease – ask about them without being phony
- Acknowledge any hesitation/awkwardness as normal
- Review retaliation against a witness
- Review immunity/amnesty
- Review confidentiality
- Review expectation of truthfulness

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ANTICIPATING WITNESSES' QUESTIONS

Witnesses may ask or say:

- Am I being investigated?
- What are you really investigating?
- How will you use the information you are given?
- Is it confidential?
- Will I get into trouble by giving you this information?
- Will I get anyone else in trouble?
- I don't want to cooperate.
- Do I need my parents/lawyer present during interview?

- Anticipating these questions and/or covering them in advance can help to ensure that you establish good rapport, which should help you get the truth.

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INTERVIEWING WITNESSES

- It may be helpful to not label the allegations as “sexual misconduct” or “sexual harassment”
- Ascertain their relation to the other parties in the matter
- Ask for their opinions about the parties and other witnesses
- Ask if either party spoke about the incident(s) after they happened
- Ask if they have noticed any significant change in the parties
- Ask if they have made any previous statements, such as to law enforcement or private Investigators
- Ask all interviewees to contact you if they remember anything else or want to add to their statement

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RESISTANT AND QUIET WITNESSES

- Gauge their resistance or hesitation and try to individually address their motivation
- Answer their questions about the process and purpose of the interview
- Explain the expectations of the school, if applicable
- Having a framework of specific topics and questions can be helpful with quiet witnesses
- Letting them know that you already know a fair amount of information and they are corroborating can be helpful
- If they become talkative, respond positively

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LYING WITNESSES

- Maintain rapport and avoid accusation
  - Use “mirroring” and collaborative problem-solving techniques
  - Recommended phrases: “Help me understand…” or “Make this make sense…” or “I think I’m missing something…”
- Allow opportunity for witness to restate
- Try to understand and individually address their motivation
- Explain the expectation for truthfulness and impact of dishonesty on the investigation/parties
- Calmly bring them back to the questions
- If needed, leave the door open for follow up

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HELPFUL INVESTIGATION DOCUMENTS

INVESTIGATION RECORDS

- "The File":
  - The Respondent's file
  - The Complainant's file
  - The investigation file (including evidence)
  - Personal case notes
  - Witness education records
- Investigation Report
- Contact Log

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INCIDENT TIMELINE

- Timeline of event(s)
- Include as much detail as possible
- What times can be established from phone calls, email, texts, and receipts?
- Identify any “gaps” and address them – may lead to information not previously shared
- Timing is highly relevant to alcohol/drug consumption in cases where consent may be an issue

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INCIDENT TIMELINE (CONT.)

- Timing also highly relevant in cases involving physical evidence such as bruising, bite marks, etc.
- In stalking and/or verbal, online sexual harassment cases, times of communication between parties may be important
- Establishing a reliable timeline useful when questioning witnesses such as bartenders and Uber/Lyft or cab drivers, and when searching for video footage

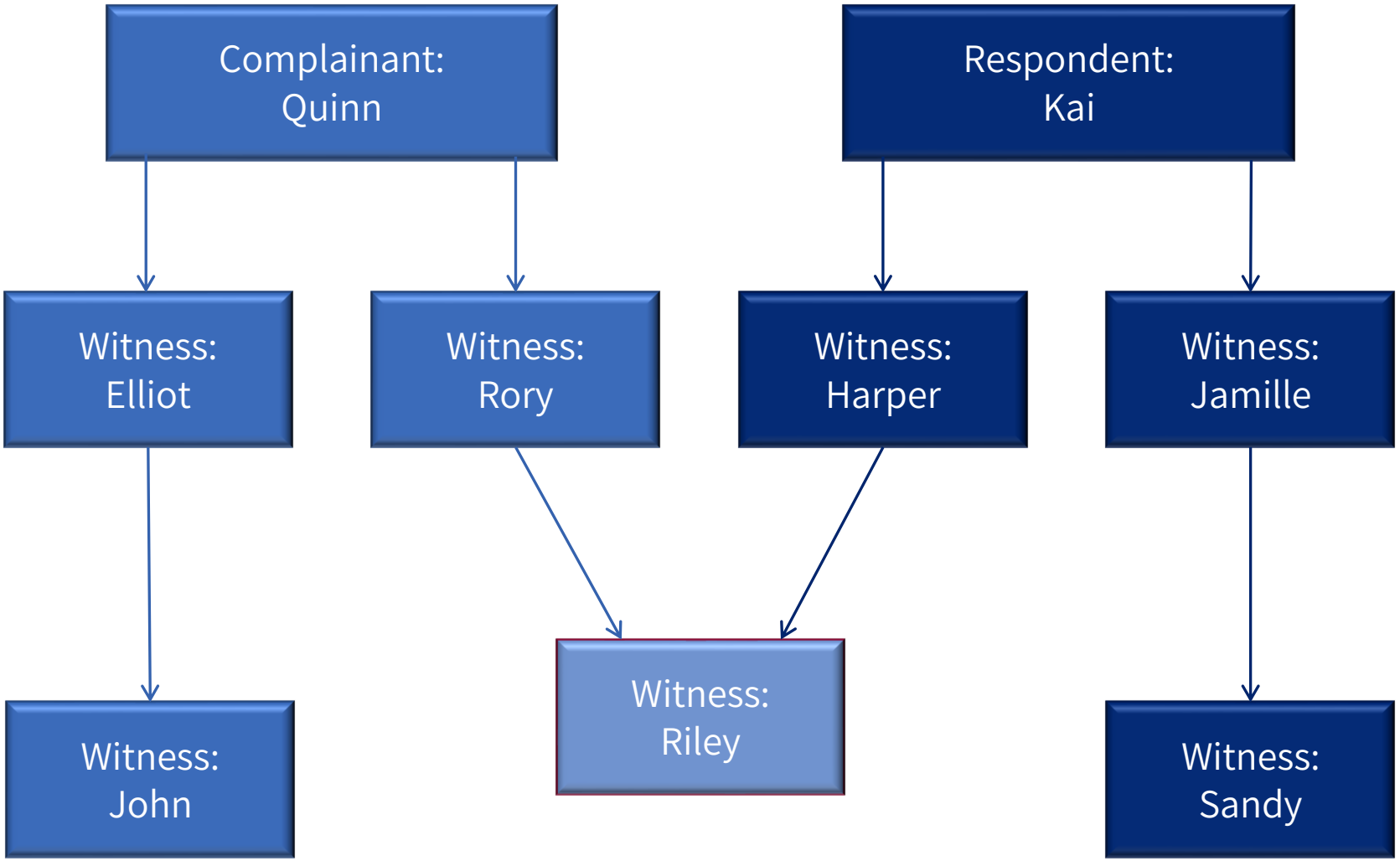
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WITNESS LIST AND FLOWCHARTING BEST PRACTICES

- Keep an updated list of witnesses as you learn of them
- Identify which parties or witnesses led you to other witnesses
- Keep track of whether witnesses are neutral, loyal and biased, or loyal but objective; include reasoning
- In complex cases, use a flowchart to track witnesses the Complainant leads you to, the witnesses Respondent leads you to, and the witnesses who are neutral
- Note in the flowchart where witnesses intersect in terms of relationships to each other and/or potential loyalties to parties

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WITNESS FLOWCHART SAMPLE



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THE INVESTIGATION REPORT

- The Investigation Report
- Standard of Evidence
- Assessment of Credibility/Synthesis
- Referral to Decision-maker

THE INVESTIGATION REPORT

- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Results of interviews with parties and witnesses
  - Unbiased summary or compilation of other information collected
    - E.g., copies of texts, emails, and social networking messages; information from law enforcement; medical exams; video surveillance; photographs

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THE INVESTIGATION REPORT

- References or contains all applicable policies and procedures
- Provides timeline of investigation steps
- Describes the allegations
- Describes and includes evidence gathered, including statements and interviews
- Explains unsuccessful attempts to collect information and/or interview witnesses

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THE INVESTIGATION REPORT – G.A.S.

- **G**ather evidence
  - Organize the evidence so it is useful to the Decision-maker who applies the policy elements
- **A**ssess credibility of parties and witnesses without making ultimate conclusions
  - Point out areas of corroboration and issues that may bear on credibility
  - Assess evidence to determine what is relevant
- **S**ynthesize areas of agreement/areas that are disputed
  - Synthesis may also include an appendix of questions posed, questions rejected, and questions considered.

G.A.S. is covered in more detail in Investigator Two

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MORE THAN FACT-GATHERING

- Review the institutional policies that apply
- Follow G.A.S. model, meaning stop short of making a finding, making a recommendation, or doing anything that influences or usurps the independent role of the Decision-maker
- If you have an opinion on whether policy was violated, keep it to yourself
- Refer report to TIXC for review and hearing/determination

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IMPORTANCE OF THE REPORT

- Decision process:
  - Investigator (through the TIXC) refers the investigation report to the Decision-maker(s) without determination
  - Investigator ≠ Decision-maker
- Report should highlight the relationships between different pieces of evidence
  - Contradictory, corroborating, (in)consistencies, etc.
  - Investigator's opinion is not controlling but should point the Decision-maker(s) toward decisive or corroborating evidence without telling them how to interpret it

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EVIDENCE AND REPORT REVIEW BY PARTIES PART 1

Prior to the completion of the investigation report:

- Evidence directly related to allegations must:
  - Be sent to each party and Advisor
  - Be in an electronic format or hard copy
  - Include evidence upon which the Recipient does not intend to rely
  - Include exculpatory and inculpatory evidence
- After sending the evidence, the Investigator(s) must:
  - Allow 10 days for written response
  - Consider response prior to completion of report

Source: § 106.45(b)(5)(vi)

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PARTY ACCESS TO EVIDENCE/REPORT

- Whether included as relevant in the investigation report or not, all such directly related evidence is subject to the parties' inspection and review and must be available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination

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EVIDENCE AND REPORT REVIEW BY PARTIES PART 2

At least 10 days prior to making a determination regarding responsibility (hearing):

- The final investigation report summarizing relevant evidence must be sent:
  - To each party and Advisor
  - In an electronic format or hard copy
  - For the parties' review and written response
- A separate file of all directly related evidence will also be shared (this evidence is excluded from the report)
- For K-12 schools without a hearing, this must occur 10 days prior to time of determination regarding responsibility

Source: § 106.45(b)(5)(vii) and § 106.45(b)(6)(ii)

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LIVE HEARING

- A live hearing, whether with a panel or an administrator, is required by OCR for Higher Ed.
  - Hearing is optional for K-12. Report review is followed by exchange of relevant written questions and responses facilitated by Decision-maker.
- Hearings facilitate the parties' ability to review all available evidence and ask questions of witnesses and each other.
- Can the hearing be waived?
- Investigators should be prepared to be subjected to cross-examination at the hearing.
- Avoid off-line discussions of case with any of the Decision-makers.

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WHAT ROLE DOES THE INVESTIGATOR PLAY IN A HEARING?

- The Investigator is often a key witness at any hearing
- The investigation report is admitted as evidence
- The Investigator may be questioned and subjected to cross-exam by all parties' Advisors
  - Why did you decide some evidence relevant; other evidence was not?
- The Investigator's opinions regarding credibility and responsibility should not influence the hearing, so questions about the Investigator's opinions should be avoided; Investigators should not volunteer, and Decision-makers should not probe for, this information

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ROLE OF THE INVESTIGATOR IN APPEALS

THE APPEAL PROCESS

- Appeals are mandatory under the Title IX regulations
- Equitable
- Clearly communicated to parties
- One level of appeal is best practice
- Defined window of time to request appeal
- Three clear grounds for appeal (though Recipients may add others)
- Committee versus individual determination preferred
- Deference to original hearing authority
- Remand

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THE ROLE OF THE INVESTIGATOR IN APPEALS

- If something about the investigation or report is appealed
- If you are claimed to have:
  - Had a conflict of interest, AND/OR
  - Been biased or prejudiced, AND
  - Exhibited that bias or conflict in a manner that significantly affected the outcome or sanction, THEN
- You should prepare a response memo and submit it to the Appeal Decision-maker or gatekeeper

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FINALITY OF DETERMINATION

- If an appeal is filed, the determination regarding responsibility becomes final on the date that the Recipient provides the parties with the written determination of the results of the appeal.
- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely.

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Questions?

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